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ABSTRACT

Disclosure of information to the investing public is a primary purpose of federal regulation of the securities industry and one of the primary duties and responsibilities of financial public relations practitioners. Disclosure requirements are numerous, with most mandating publicly held corporations to disclose information. Some requirements, however, delineate types of information that may not be disseminated by the corporations. Given recent concern over the application of First Amendment free speech rights to corporations, especially in the wake of the Supreme Court's decision in "First National Bank of Boston et al v. Bellotti," there may be some question as to whether Securities and Exchange Commission (SEC) mandated disclosure of information can be interpreted as an infringement on a corporation's right of free speech. An examination of such disclosure requirements and judicial interpretation of corporate free speech from historical and critical perspectives leads to the conclusion that changes may be needed in SEC regulation of information dissemination about the securities industry in order to avoid First Amendment conflicts. (FL)

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PUBLIC RELATIONS DIVISION

SEC-MANDATED DISCLOSURE AND CORPORATE FREE SPEECH: A CRITICAL PERSPECTIVE

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Introduction

One of the primary purposes of government regulation of private activities in the United States is to protect the public interest. And one of the primary means used by regulatory agencies to accomplish that purpose is requiring the dissemination of information, either by requiring private interests to disclose that information themselves or by requiring private interests to furnish information to a regulator who in turn disseminates the information to the public. The public interest, in this approach, is best served by adequate information being available to guide public choice.

Many federal government regulatory agencies require disclosure of information in a variety of forms and contexts. Among the executive branch agencies, the Food and Drug Administration administers standards for labeling of food, drugs and cosmetics; the Consumer Product Safety Commission requires that manufacturers provide adequate information to enable consumers to safely use inherently dangerous products; and the Internal Revenue Service requires a variety of income information from individuals and corporations.

Among independent regulatory agencies, the Federal Communications Commission requires that broadcast licensees disclose programming and community-service information for perusal on license renewal applications; the Federal Trade Commission sets information standards for advertising and labeling of consumer products; and the Securities and Exchange Commission's disclosure policies dictate to the securities industry particular types of information which must, or must not, be disclosed and the manner, form and time frame in which that information must be disclosed.

It is the intention of this paper to examine the information disclosure requirements of this last agency, the Securities and Exchange Commission (SEC),

focusing on what those regulations entail, the purposes they are intended to serve, and most significantly for the area of public relations law, their potential for infringing on Constitutional rights, specifically the First Amendment right of free speech.

The Sec and Disclosure

The Securities Act of 1933 and the Securities Exchange Act of 1934, which created and gave shape to the SEC, were, from a political point of view, reactions to the troubled economic climate of the times. Thousands of small investors who had flocked to the stock market during and immediately after the boom years of the 1920s had been wiped out. The country needed a scapegoat, and Wall Street was a likely candidate. From 1932 to 1934 the U. S. Senate held a series of widely-publicized hearings on the securities industry during which widespread financial fraud and abuse were uncovered.

This debate, which led to passage of the securities laws, was much influenced by free-market economic theory and the ideas of Louis Brandeis, who felt disclosure would not only prohibit illegal activity, but deter "improper" fiduciary conduct.[1] The draftsmen of the 1933 Act rejected direct regulatory intervention in the activities of the securities industry in favor of a scheme that emphasized disclosure as a cure for the imperfections and abuses found to be prevalent in the present system.

> Disclosure, it was thought, would principally serve to improve the functioning of the securities markets by providing to investors the information they needed to evaluate the merits of a potential investment. Moreover, although this goal was distinctly secondary, it was also recognized that disclosure would help to deter fraud and self-dealing conduct.[2]

President Franklin D. Roosevelt, in his message to Congress urging passage of this landmark legislation, echoed the lawmakers' emphasis on the benefits to

be served by disclosure:

> Of course the federal government cannot and should not take any action which might be construed as approving or guaranteeing that newly-issued securities are sound in the sense that their value will be maintained or that the properties which they represent will earn profit. There is, however, an obligation upon us to insist that every issue of new securities to be sold in interstate commerce shall be accompanied by full publicity and information, and that no essentially important element attending the issue shall be concealed from the buying public. The doctrine of "let the seller also beware" puts the burden of telling the whole truth on the seller. It should give impetus to honest dealing in securities and thereby bring back public confidence.[3]

Although the 1934 Act represented a much more direct intervention in the substantive operations of the securities markets, it, too, relied heavily on disclosure as a device both for providing investors with reliable information about firms whose stocks and bonds were traded in the market, and for discouraging stock manipulation and unethical management practices.

Before the two Securities Acts and the SEC appeared on the scene, there was very little formal regulation of the securities markets aside from state blue sky laws and what federal regulation occurred under antitrust laws. There was virtually no attempt to regulate the disclosure of financial information in any consistent manner or on a national basis.[4] These areas had been left to the private sector and especially to the emerging self-regulatory bodies such as the New York and American stock exchanges, the National Association of Securities Dealers and the Put and Call Dealers Association.

With the establishment of the SEC, however, government oversight was introduced. And despite the passing of years and additional statutes, its basic premises of full disclosure, antifraud provisions and government "watchdogging" of self-regulation have not changed.

Purposes of Disclosure

While there is agreement that disclosure is a primary purpose of federal regulation of the securities industry, there is less agreement as to the basic purposes of that disclosure. One theory argues that the purpose of disclosure is to provide information to investors so that informed investment decisions can be made. The House of Representatives Report accompanying the Securities Exchange Act of 1934 stated:

> The idea of a free and open public market is built upon the theory that competing judgments of buyers or sellers as to the fair market price of the security brings about a situation where the market price reflects as nearly as possible a just price. Just as artificial manipulation tends to upset the true function of an open market, so the hiding and secreting of important information obstructs the operations of the markets as indices of real value. There cannot be honest markets without honest publicity.[5]

Edward F. Greene, director of the SEC's Division of Corporation Finance, echoed these early sentiments just last year when he noted, during an American Bar Association seminar on the SEC and corporate disclosure:

> Mandated disclosure adds a discipline to the markets that greatly enhances the quality of all disclosure. Mandated disclosure insures the public availability of information which probably would not otherwise be published. Mandated disclosure must inevitably have an antiseptic, inhibiting effect on fraud and insider trading ... but also serves as the insurer of the integrity of even informal disclosure. This combined disciplinary effect on the quantity, quality and accuracy of the information in the marketplace sets the stage for an efficient market. Without this discipline, security prices would not necessarily reflect all relevant information because that information would not necessarily be accurate.[6]

A second major theory as to the purpose of disclosure is that it provides a means of protecting investors from the dangers of fraud. This goal was mentioned by President Roosevelt in his message to Congress advocating passage of the 1933 Act.[7]

Whichever theory, or whichever combination of the two, was behind the promulgation of SEC rules and the SEC at that time on disclosure, it is clear that Congress and the SEC had little faith that disclosure would occur without it being mandated by the SEC because of corporate greed, timidity, and aversion to risk.

> If the choices open to a corporation are either to remain silent and let false rumors do their work, or to make a communication not legally required, at the risk that a slip of the pen or failure properly to amass or weigh the facts will lead to large judgments payable in the last analysis by innocent investors, for the benefit of speculators and their lawyers, most corporations would opt for the former.[8]

An interesting observation about these initial SEC disclosure statutes, rules and regulations is that they constituted attempts to influence the behavior of the securities industry "not by dictating what firms may and may not do but by changing the rules governing the availability of information about what they do."[9]

Summary of Disclosure Requirements

The most important of the disclosure requirements administered by the SEC are the 1933 and 1934 Acts. The first of these statutes deals principally with the issuance of new securities, and its primary disclosure requirement is the registration statement which, subject to only a few exemptions, must be filed with the SEC before a new issue can be sold to the public. The 1934 Act is a comprehensive regulatory scheme that includes among its provisions a number of important disclosure requirements related to the regular reporting of corporate financial information.

There are more than 25 reports and documents required under the SEC disclosure rules and regulations. In addition to requiring a registration statement containing specific information, the 1933 Act sharply restricts public statements or publicity by the corporation before or in conjunction with a new security offering. Prior to the filing of the registration statement itself, any communication which might further the public offer or sale of securities is prohibited. Between the date of filing of the registration statement and the date the stocks are actually available for sale, the only communication permitted is a statutory prospectus and a so-called "tombstone advertisement" announcing the pending sale without giving anything more than factual details of the sale.

These clear-cut prohibitions of prefiling publicity are SEC attempts to prevent "gun jumping," pre-filing activity designed to encourage sales before "official" information has been filed with the Commission. The SEC's concern "seems to be directed principally toward efforts to 'pre-condition the market' or to 'indirectly sell or offer the securities'" through public statements, news releases to the mass media, or advertisements in the mass media.[10]

The 1934 Act takes disclosure beyond the initial registration requirement with various reporting mandates designed to keep information on file with the SEC. The most important of these reporting mandates is the annual report, often called the 10-K report, which asks for 15 separate items, ranging from a brief description of the business of the corporation and its subsidiaries to audited financial statements for the last two fiscal years.

The 1934 Act also requires regular quarterly reports (abbreviated versions of the annual report) and "current reports" which must be filed upon the occurrence of events that materially affect the fortunes of the corporation.

One section of the 1934 Act -- Section 10b-5 -- has as its primary purpose the restriction of information disclosure rather than its promotion. Under Rule 10b-5 it is unlawful:

> for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the media, or of any facility of any national securities exchange,
>
> 1) to employ any device, scheme or artifice to defraud
> 2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statement made, in light of the circumstances under which they were made, not misleading, or
> 3) to engage in any act, practice or course of business which operates as a fraud or deceit upon any person in connection with the purchase or sale of any security.[11]

The purpose of this section is primarily to regulate disclosure as a means of preventing fraud, rather than as a means for insuring availability of adequate

information for informed investor decisions, which is the case with the various reports required by the same Act.

In its report to the House Committee on Interstate and Foreign Commerce, a special study commission established to examine the effectiveness of the SEC noted that Section 10b-5 had been interpreted by the SEC to prohibit not merely untrue statements but the dissemination of "soft" or future-oriented information, such as earnings projections, which could not be verified by current fact.

> It is sometimes difficult to draw a sharp line between misleading publicity and publicity which merely puts a company in the best possible light that is still consistent with the truth ... Rarely is information disseminated which is complete fabrication; more likely is that some information is overly optimistic sales or earnings projections based primarily on wishful thinking ... The release of inaccurate or over-optimistic information can be as harmful to investors as the deliberate withholding of news by companies, but there is a fine line between premature publicity of an event that may not come to pass and withholding publicity about events known to or suspected by insiders.[12]

While the SEC has traditionally been opposed to any dissemination of such projective information, there has been some recent softening of this position. Former SEC Chairman Ray Garrett, in a 1974 speech, stated that:

> while we (the SEC) may not agree with the method of presentation in all respects, we do not object to reasonably-based estimates of future performance appearing in annual reports.[13]

Since then, the SEC's standards for inclusion of "soft" information have evolved further, and it now appears that the SEC will permit inclusion of such information when:

> there appears to be a reasonable basis for the good-faith prediction, the primary assumptions underlying the prediction are articulated, the information reflects management's best subjective judgment, and future plans disclosed are those the company is reasonably capable of achieving within a reasonable time period and to which it has substantially committed itself.[14]

From this brief overview of SEC disclosure requirements, it can be seen that the Commission is concerned with both sides of the disclosure coin. One side of that coin requires information, and seeks to promote its dissemination at least to

the SEC and, hopefully, through filings with the SEC, to the investor public. The other side of the coin, however, prohibits information, primarily information that is false or misleading, but also, in some instances, "soft" information which cannot be substantiated with financial fact. Disclosure thus means both requiring a corporation to speak and, at times, requiring it to be silent.

Disclosure Enforcement Mechanisms

The SEC (and before SEC creation in 1934, the Federal Trade Commission which had been empowered under the 1933 Act to regulate securities registration) has at its disposal a variety of mechanisms to enforce the disclosure requirements it has imposed.

Under the 1933 Act, which deals primarily with disclosure in connection with registration of securities for sale, the SEC may conduct investigations of violations, with full powers to subpoena witnesses, take evidence, and require documents and materials to be produced for examination. Those who fail to comply with the conditions of these investigations may be held in contempt of court. Upon determination by the SEC that truth-in-registration disclosure rules have been violated, the SEC may issue a stop order prohibiting the sale of securities in registration, and may bring suit for civil liability against the officers, directors, accountants and others who have signed the registration statement found to be false and misleading. Violators may be fined up to $5,000 and imprisoned for up to five years, or both.

The 1934 Act also empowers the SEC to conduct investigations, and if those investigations lead to a determination of violation, the SEC can suspend an entire securities exchange, a brokerage firm or an individual broker or seller of securities from trading. The Commission also can expel members of a securities exchange who violate disclosure rules, and can suspend, through a court-ordered injunction, trading of stock in a particular corporation which is found in violation.

The fines for violation of the 1934 Act range up to $500,000 for a firm and up to $10,000 for an individual, with prison terms of up to two years also an option for individual violators.

Violators of either the 1933 Act or 1934 Act can, after being charged and judged guilty of a violation by the SEC, appeal to the Circuit Court of Appeals of the United States to set aside the SEC order holding them in violation.

Disclosure and The First Amendment

While there are and have been many criticisms of SEC disclosure requirements -- as ineffectual, unenforceable and riddled with inequity -- one potential area of criticism seems to have been largely ignored: that requiring disclosure may not be the most effective means of assuring adequate information because it carries some risk of infringing upon a corporation's right of free speech and expression. That concern was given only brief attention in the 1963 Special Study report, which stated:

> The volume of corporate publicity, the paramount aim of full and prompt disclosure, the difficulty of making judgments concerning specific items of publicity, and the proximity of this field to the Constitutionally-protected right of freedom of expression -- all combine to make legal control a relatively clumsy instrument.[15]

The proximity mentioned by the study group of requiring corporations to speak, or requiring them to be silent, and First Amendment free speech guarantees has been ignored since 1963, to the best of this author's knowledge. It is imperative that this issue receive fresh attention, especially in the light of recent precedent-setting Supreme Court decisions in the area of corporate free speech, for it seems to be a problem of significant enough magnitude to warrant a rethinking of means to disclosure of securities information.

The First Amendment and Corporate Free Speech

The First Amendment represents a national commitment to the principle that no one shall make any laws infringing upon freedom of expression, and that debate on

public issues should be uninhibited, robust and wide open. The major purpose of the amendment is "to foster and protect free discussion, without which a system of government based on the consent of an informed citizenry could not function."[16] The U. S. Supreme Court has emphasized that the First Amendment "embraces at the least the liberty to discuss publicly and truthfully all matters of public concern."[17]

There is clear agreement among legal scholars, practitioners and philosophers that the First Amendment protects the right to speak. But does it also protect the right not to speak? That question seemed to have been answered in 1943 when the U. S. Supreme Court held that West Virginia could not compel school children to recite the pledge of allegiance if they declined to do so for religious reasons. Mr. Justice Jackson wrote for the Court:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, relgion or other matters of opinion or force citizens to confess by word or act their faith therein.[18]

But because this decision rested not solely on the First Amendment but also on due process of law accorded to states, the issue of a right to silence returned during the 1950s and 1960s. The Court seesawed back and forth, sustaining at times and overruling on other occasions the constitutional claims of witnesses in legislative investigations to remain silent. The overriding consideration in all these cases was that government can force the citizens to speak:

> only on the basis of substantial interests, even when the reasons for silence do not reflect constitutional concern. When the inquiry touches freedoms of expression or religion, a much stronger showing of interest must be made -- proof of a clear connection between the demand for information and an overriding or compelling state interest.[19]

So with some important exceptions that should not be ignored, the land's highest court seems to be giving an affirmative answer to the question of right to silence.

Though it is a right, freedom of expression is not absolute, and few reasonable persons have ever maintained that it should be. From the earliest times, the command of the First Amendment has been understood to imply certain exceptions and limitations. The central issue seems to be when and to what degree the protection of the First Amendment is forfeited -- what the exceptions should be -- rather than when and to whom the First Amendment applies.

Blackstone, the eighteenth-century British legal scholar, argued that protection of free speech extended only to prior restraint of censorship, so that punishment after the fact of speech or expression would not abridge fundamental liberties.[20]

Other legal scholars, and indeed some jurists, have argued that the right of free speech extends only to individuals: a personal right exercised only by natural persons. In the landmark case of Gitlow v. New York, the Supreme Court held that freedom of speech and of the press are among the fundamental personal rights and liberties protected by the due process clause.[21] Free speech, as interpreted by the court, guarantees every citizen adequate opportunities to espouse or consider all issues, and this speech may not be impeded because of its content or motivation.

First Amendment freedoms became less concrete when applied to corporations, for Supreme Court decisions have held a corporation not a "citizen" within the Fourteenth Amendment's privileges and immunities clause, but a "person" within the due process and equal protection clauses.[22] Despite these distinctions, the Supreme Court has held that a corporation may assert its members' rights collectively.[23]

Judicial clarification of a corporate right of free speech, until recently, had been inadequate and inconclusive. One of the intimations that business entities have First Amendment rights came in Grosjean v. American Press Company, where the Supreme Court, by holding that a corporation is a person under the equal protection

and due process clauses of the Fourteenth Amendment, "implicitly recognized the possibility that speech of a corporate person could also be protected."[24]

In Schneider v. State, the Supreme Court moved somewhat closer to recognition of a corporate First Amendment right, holding that the freedom of speech and of the press secured by the First Amendment against abridgment by the United States is similarly secured to all by the Fourteenth Amendment against abridgment by the state.[25] The Schneider decision extended First Amendment rights to all, but free speech rights of the corporation were far from firmly established. Additional support for those rights came in two labor dispute cases: N.L.R.B. v. Ford Motor Co. and N.L.R.B. v. Virginia Electric and Power Co. In these cases (one heard and the other denied certiorari) the Court determined that an employer could not be enjoined from expressing its views on labor policies or problems, and since by implication the defendant employers were major corporations, the Court again protected freedom of corporate speech.[26]

In 1948, the Supreme Court came closer to an explicit, rather than implicit, statement of a corporate right to free speech. In United States v. CIO[27] the Court held that if section 313 of the Federal Corrupt Practices Act, which prohibited corporate expenditures, was:

> construed to prohibit the publication, by corporations and unions ... of periodicals advising their members, stockholders or customers of danger or advantage ... from the adoption of measures, or the election to office of men espousing such measures, the gravest doubt would arise .. as to its constitutionality.[28]

Mr. Justice Rutledge's concurring opinion was even more to the point: it could not be taken on "legislative assumption, practice or judgment that restrictions upon freedoms of expression by corporations are valid."[29]

The subsequent cases involving corporations heard by the Supreme Court seemed to indicate a return by the Court to its previous practice of recognizing consti-

tutional protections for speech and press without commenting explicitly on the corporate identity of the speaker. A clear and meaningful statement of the corporate right to free speech did not come until 1978 and the Supreme Court's decision in First National Bank of Boston et al v. Bellotti.

The Bellotti Case

A group of banks and corporations -- the First National Bank of Boston, New England Merchants National Bank, the Gillette Co., Digital Equipment Corp., and Wyman-Gordon. -- wanted to spend money to publicize their views on a proposed Massachusetts constitutional amendment that was to be submitted to the voters as a ballot question at a general election on November 2, 1976. The amendment would have permitted the legislature to impose a graduated tax on the income of individuals. But a state statute prohibited corporations from making contributions or expenditures:

> for the purpose of ... influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation.[30]

The statute further specified that no question submitted to the voters which solely concerned taxation of income, property or transactions of individuals "shall be deemed materially to affect the property, business or assets of the corporation."

The banks and corporations sued the state, seeking to have this statute declared unconstitutional. In their suit, appellants argued that the statute violated the First Amendment, due process and equal protection clauses of the Fourteenth Amendment, and similar provisions of the Massachusetts Constitution.

On April 26, 1976, the case was submitted to a single justice of the Massachusetts Supreme Judicial Court on an expedited basis. Judgment was reserved and the case was referred back to the full court that same day. On September 22, 1976, the full court directed the single justice to enter judgment upholding the

constitutionality of the statute; a formal opinion to that effect was delivered on February 1, 1977. The opinion distinguished the First Amendment rights of a natural person from the more limited rights of a corporation, and concluded that:

> only when a general political issue materially affects a corporation's business property or assets may that corporation claim First Amendment protection for its speech or other activities entitling it to communicate its position on that issue to the general public.[31]

The corporations appealed, and the U. S. Supreme Court reversed the Massachusetts court opinion, holding that:

> there is no support in the First or Fourteenth Amendment, or in this Court's decisions, for the proposition that such speech loses the protection otherwise afforded it by the First Amendment simply because its source is a corporation ... Commercial speech is accorded some constitutional protection not so much because it pertains to the business as because it furthers the societal interest in the free flow of information.[32]

In reversing the lower court's decision, the Supreme Court held, in the opinion written by Justice Powell, that the proper question:

> is not whether corporations 'have' First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether (the Massachusetts statute in question) abridges expression that the First Amendment was meant to protect ... If the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It is the type of speech indispensable to decision-making in a democracy, and this is no less true because the speech comes from corporations rather than an individual. The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union or individual.[33]

Even Chief Justice Warren Burger, although he dissented from the majority opinion, agreed that "the First Amendment does not belong to any definable category of persons or entities, it belongs to all who exercise its freedoms."[34]

The Court went on to state that any legislature is constitutionally disqualified from dictating the subjects about which persons may speak and which persons may address a public issue:

> If a legislature may direct business corporations to 'stick to business,' it also may limit other corporations -- religious, charitable or civic -- to their respective 'business' when addressing the public. Such power in government to channel the expression of views is unacceptable under the First Amendment ... the state may prevail only upon showing a subordinating interest which is compelling.[35]

This last point -- that government is severely limited in dictating to corporations the areas in which they may speak -- seems to contradict some of the rules under which the SEC regulates corporate disclosure. The SEC clearly does tell corporations what areas they must address in reports required by and filed with the Commission; each report has its own "table of contents," a list of what information must be included. And the SEC also tells corporations what areas they must not address when it prohibits, or severely limits, the public disclosure of projective, future-oriented information in SEC-mandated filings. It is because of this compelling contradiction that the relationship of SEC-mandated disclosure to First Amendment guarantees of corporate free speech deserves examination and study by those charged with responsibility for monitoring and, if necessary, modifying disclosure regulations.

The Bellotti Decision as Precedent

The Supreme Court's decision in First National Bank v. Bellotti formed the basis for decisions in two later Supreme Court cases dealing with First Amendment guarantees of corporate free speech. In Central Hudson Gas and Electric Corp. v. Public Service Commission of New York,[36] the Supreme Court held that a New York Public Service Commission regulation banning all promotional advertising by electric utilities was in violation of the First and Fourteenth Amendments since complete suppression of all promotional advertising is more extensive than necessary to further the state's substantial interest. In Consolidated Edison Company of New York, Inc. v. New York Public Service Commission,[37] the Supreme

Court ruled unconstitutional an order of the public service commission that prohibited the inclusion by public utility companies of inserts in monthly bills discussing controversial issues of public policy.

The Bellotti decision was paramount in shaping the Court's opinion in both instances. Telford Taylor, the New York attorney who represented Central Hudson in its appeal of the promotional advertising prohibition, said:

> The Court clearly relied on the Bellotti decision in stating that the state -- in this case the New York Public Service Commission -- could not suppress communication that is neither misleading nor related to unlawful activity unless it can assert a substantial state interest that cannot be served in any way other than restrictions on commercial speech. The four-part analysis used by the Court seems to have evolved directly from Bellotti: that first the Court must determine whether the expression is protected by the First Amendment, then ask whether the asserted government interest is substantial, then determine whether the regulation directly advances the government interest, and finally determine whether the regulation is not more extensive than is necessary to serve that interest or is really a least-means of regulation.[38]

While the Bellotti decision leaves little doubt that corporate communications come within the scope of the First Amendment, the scope of situations to which the decision may be applied in further cases remains to be seen. If the Bellotti decision is interpreted narrowly, First Amendment protection has been extended only to the expenditure or contribution of corporate funds to express a political viewpoint on referenda or other ballot measures. Under this narrow interpretation, there is no implication that corporations have comparable rights of free speech in other areas -- for instance, expression of views or corporate spending in political campaigns for election to public office.

> The Bellotti Court held impermissible the prohibition of corporate expenditures and contributions only in ballot measures. The Federal Election Campaign Act of 1971, in contrast, proscribes corporate contributions or expenditures only in federal elections ... The Court in Bellotti left open the possibility that Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections ... The Bellotti decision left considerable leeway in its opinion for either expansion or restriction in the area of federal elections.[39]

Regardless of whether the Bellotti decision will be extended to other categories of corporate speech, however, the decision did establish an analytical framework by which governmental attempts to restrict corporate communications can be tested. Indeed, it was that four-part analytical framework which attorney Taylor noted being applied in the Central Hudson case. That framework, focusing first on whether the particular speech involved is protected under the First Amendment and, if so, weighing the state interests against a strict standard of review, may well become the method by which subsequent governmental restrictions on corporate speech will be measured. In the context of SEC-mandated disclosure, it might be that a court test of the Commission's reporting requirements and prohibitions would rely on this landmark First Amendment decision. Since there is now a precedent, it would seem prudent to give serious consideration to alternatives to the present mandated disclosure policies, alternatives which might avoid even the possibility of a court test under the Bellotti framework.

Footnotes

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34
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35
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36
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37
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38
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39
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